No. 82-52

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# Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,

*Petitioners,*

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF OF AMERICAN NURSES' ASSOCIATION, AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

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# BRIEF OF AMERICAN NURSES' ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

American Nurses' Association ("ANA"), as amicus curiae, submits this brief in support of the respondents. Pursuant to Supreme Court Rule 36.2 this brief is

accompanied by the written consent of all parties.

## INTEREST OF THE AMICUS CURIAE

ANA is the nation's largest professional organization of registered nurses. It has approximately 165,000 members belonging to constituent associations in the fifty states, the District of Columbia, the Virgin Islands and Guam. ANA's purposes are to foster high standards of nursing practice, to promote the professional and educational advancement of nurses, and to promote the economic and general welfare of nurses to the end that all people may have better nursing care.

ANA is strongly committed to the eradication of all forms of discrimination on the basis of sex, race and other arbitrary classifications, particularly in the field of nursing care. To fulfill this

commitment ANA has participated frequently in judicial proceedings involving matters of concern to its membership. In this Court, for example, ANA participated as amicus curiae in support of the plaintiffs in City of Los Angeles v. Manhart, 435 U.S. 702 (1978).

Despite this Court's decision in Manhart, many of ANA's members continue to be affected by retirement plans which provide lower periodic benefit payments to women than to men. A great number of ANA's members are covered by such plans of the Teachers' Insurance and Annuity Association and College Retirement Equities Fund ("TIAA/CREF") at hospitals and nursing educational institutions affilated with public and private universities and colleges. ANA has been among the many groups and individuals challenging the validity of

these plans under Title VII.[1] Indeed, ANA's most active challenge to this form of gender based compensation discrimination, American Nurses' Association v. TIAA-CREF, No. C-75-558-G (M.D.N.C.), is presently stayed pending this Court's disposition of the case at bar.

What the Court does in this case, therefore, is a matter of vital concern to ANA and its members throughout this country. The nursing profession, which is largely female, has looked to the federal anti-discrimination laws to assure that the level of compensation for nurses, which is being eroded by inflation and hard ecomonic times, is not further diminished by discriminatory employment practices. ANA

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[1] Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended by the Equal Opportunity Act of 1972, 86 Stat. 103. 42 U.S.C. §§2000e et seq.

is thus concerned that this case be decided consistently with Title VII's focus on individuals, not classes, and with this Court's specific rejection of actuarial or class equivalence as an exception to the statute's prohibition of discrimination against individuals. The proliferation of petitioners' amici, most of whom are trying to reargue Manhart or limit it to its facts, has heightened ANA's concern.

ANA's purpose in this case, therefore, is to demonstrate that the arguments for reversal advanced by petitioners' amici are unconvincing because they are the same arguments urged on this Court in Manhart and explicitly rejected in that case. This brief thus urges the Court to give full recognition to the breadth of Manhart's rationale so that the Congressional promise in Title VII to eradicate sex discrimination in compensation will become

an economic reality to working women covered by the statute.

## STATEMENT OF POSITION AND SUMMARY

ANA supports the plaintiffs' position in this case because, in its considered judgment, Arizona's deferred compensation plan which provides smaller life annuity payments to all female annuitants solely because of their sex, is inconsistent with Title VII, as construed in Manhart.

ANA urges this Court to confine the controversy to the questions set forth in the petition for certiorari and not abandoned by the petitioners and those questions which are fairly included therein. Supreme Court Rule 21.1(a). Indeed, the abandonment by the petitioners of a portion of their petition and the consequent narrowing of this case may warrant further

consideration by the Court about the need to exercise its certiorari jurisdiction. Supreme Court Rule 17.1(a) and (c). In any event, the Court should not permit its discretionary jurisdiction to be used for relitigating the applicability of §703(a) of Title VII to retirement plans which appear actuarially fair but which discriminate against individual females in contributions or benefits. The question of the scope of Title VII's substantive coverage was settled in Manhart. Reargument of that question is nothing less than a "second bite at the apple" and ignores this Court's proper concern for the principle of stare decisis. Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977); Edelman v. Jordan, 415 U.S. 651, 671 (1974).

To the extent, however, that this Court is obliged to consider the rationale of Manhart in reaching its decision, ANA

urges that full recognition be given to the Court's rejection of the "actuarial equality" arguments in Manhart and to the lack of any meaningful distinction between defined benefit and defined contribution retirement plans for purposes of determining the scope of Title VII's coverage. The argument in this brief is therefore limited to these two points.

First, the brief demonstrates that in Manhart this Court expressly and without reservation rejected the actuarial equality argument which is once again being advanced as a reason for reversal in the case at bar by TIAA-CREF, the American Council of Life Insurance ("Am. Council"), the National Association of Insurance Commissioners ("NAIC"), the Equal Employment Advisory Council ("EEAC"), the American Academy of Actuaries ("AAA") and the New York State Teachers' Retirement

System ("NYSTRS").[2]

The Court in Manhart had before it the identical proposition that retirement plans which provide actuarially equivalent benefits to male and female annuitants were not proscribed by Title VII. The rejection of actuarial equivalence as a special exclusion from coverage under §703(a) of Title VII was thus made after mature consideration of the same arguments now being urged again in this case.

Second, the brief demonstrates that the rationale of Manhart applies without dilution to defined contribution as well as to defined benefit retirement plans. Requiring all women to accept a lower level of

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[2] Brief of TIAA-CREF, pp. 20-25; Brief of Am. Council, pp. 10-22; Brief of NAIC, pp. 22-27; Brief of EEAC, pp. 15-27; Brief of AAA, pp. 11-16; Brief of NYSTRS, pp. 5-15.

benefit payments because of their sex is just as invidious as a requirement that they contribute more from their current earnings in order to obtain an equal level of retirement benefits. Manhart took account of the economic realities of retirement plans, and its rationale is broad enough to cover both forms of discrimination.

## ARGUMENT

### I. THE "ACTUARIAL EQUIVALENCE" ARGUMENT URGED AS A GROUND FOR REVERSAL IN THIS CASE WAS RAISED AND EXPLICITLY REJECTED IN MANHART.

Several of the amici supporting Arizona argue at length that because women as a group live longer than men as a group lower monthly retirement compensation to all women is justified because it is the "actuarial equivalent" of the higher rate of retirement compensation to all men.

E.g., Brief of TIAA-CREF, pp. 21-22; Brief of Am. Council, pp. 14-17. The same argument was made to this Court by the same parties in Manhart.

For example, TIAA-CREF argued to this Court in Manhart that an "individualistic" approach to the problem of discrimination in insured pension benefits was not realistic because "benefits of equal actuarial value for all employees upon retirement" preclude a finding of invidious discrimination. Manhart Brief of TIAA-CREF, pp. 17, 21-22. Similarly, the American Council of Life Insurance told this Court in Manhart that in a defined contribution plan the receipt by females of lower rates of retirement compensation was not discrimination prohibited by Title VII because "[i]n actuarial terms, however, the 'value' of the benefits received by both male and female employees is the same." Manhart

Brief of Am. Council, p. 20.

The so-called actuarial equality argument was refuted in detailed fashion by plaintiffs and their supporting amici in Manhart. The plea to substitute "actuarial equality" for Title VII's "anticategorical premises" was, for example, refuted at length on pages 28-43 of a brief filed jointly by the American Association of University Professors and the American Civil Liberties Union. Similarly, a joint brief filed by the AFL-CIO and the UAW demonstrated that a plan in which females are afforded actuarial equality or equivalent present value does not treat similarly situated men and women equally where women are required to make higher periodic contributions or to receive lower periodic benefits. Brief at pp. 19-24.

Furthermore, the parties in Manhart

specifically joined issue in this Court on the question of whether actuarial equality in a retirement plan entitled the plan to immunity from liability under Title VII. Petitioners' Brief, p. 4; Respondents' Brief, pp. 7-9, 20. Thus, there is no doubt whatsoever that the notion of actuarial equality, as it applies to both defined benefit and defined contribution plans, see Manhart Brief of Am. Council, pp. 19-20, was fully briefed and properly before this Court in Manhart.

In response to these arguments, this Court held in Manhart that a defined benefit retirement plan which required females to contribute more from their current wages than their male counterparts violated Title VII. 435 U. S. at 711. The rationale for this decision is that fairness to classes - the heart of the actuarial equality argument - is "essentially a matter

of policy for the legislature to address" and that Congress determined in §703(a) to foreclose reliance on the notion of class fairness, i.e., actuarial equivalence. 435 U.S. at 709. The Court justified this rationale by reference to the language of the statute which focuses unambiguously on the individual. Thus, the Court ruled that even a true generalization about the class (in this case female longevity) ". . . is an insufficient reason for disqualifying an individual to whom the generalization does not apply." 435 U. S. at 708. The Court also justified its rationale on the "basic policy of the statute" which "requires that we focus on fairness to individuals rather than fairness to classes." 435 U. S. at 709.

The Court's construction of the scope of §703(a) to cover discrimination in retirement plans which provide actuarially

equal benefits was thus reached after full argument and deliberation and was premised squarely on the language and policy of the statute. Putting to one side the peripheral issues about the level of participation necessary to subject an employer or its agent to liability under the statute, the holding in Manhart on the scope of substantive coverage of §703(a) is broad enough to encompass both defined benefit and defined contribution plans generally and, in particular, the plan offered by Arizona in this case.

Several of petitioners' amici, nonetheless, persist in attempting to relitigate Manhart's rationale. They point, for example, to what they regard as the special case of life annuities as a form of "insurance" against longevity, and they argue that insurers may resort to sex-segregated mortality tables in assessing risk. The

decision in Manhart, however, explictly dealt with this argument which is nothing more than an echo of the argument made by the insurance industry in Manhart (supra, footnote 2):

> Finally, there is no reason to believe that Congress intended a special definition of discrimination in the context of employee group insurance coverage. It is true that insurance is concerned with events that are individually unpredictable, but that is characteristic of many employment decisions. Individual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII. 435 U. S. at 710.

In determining the applicability of §703(a) to this case, therefore, the Court should give full recognition to Manhart's explicit and detailed construction of that statute and its clear rejection of the notion of actuarial equality as a defense to liability under that section. As this Court remarked in Illinois Brick Co.

v. Illinois, ". . . considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." 431 U. S. at 736. To permit this Court's certiorari jurisdiction to be used for relitigation of a recently decided issue of statutory construction would draw into question the vitality of the stare decisis principle. Exercise of this Court's discretionary jurisdiction for such a purpose would also appear to be inappropriate under this Court's Rule 17.1(a) and (c).

In any event, the Court in Manhart specifically directed the parties' attention to the role of Congress in the matter of actuarial equality. The Court said that the question of fairness to classes is "essentially a matter of policy for the legislature to address." 435 U.S. at

709. Congress, however, has remained silent on the matter of actuarial equality since Manhart, and from this legislative silence can be inferred a reaffirmation of Title VII's focus on discrimination against individuals, not classes. See Cleveland v. U.S., 329 U.S. 14 (1946).

Having failed to convince this Court in Manhart that Congress intended to exclude discriminatory but actuarially "fair" retirement plans from Title VII's coverage, and having failed to convince Congress to modify Title VII after Manhart, it is remarkable that the pension industry is now asking this Court to make this legislative choice. Such a request not only bears the stamp of futility, it also positively ignores the proper allocation of power between Congress and this Court.

In short, the clarity of this Court's construction of §703(a) after extensive

briefing from many institutions having an interest in the scope of §703(a)'s coverage, coupled with acquiescence by Congress in the Court's construction, demonstrates that the present attempt to argue actuarial equality is nothing more than a brazen challenge to the "presumption of adherence to [this Court's] prior decisions construing legislative enactments." Illinois Brick Co. v. Illinois, 431 U. S. at 736. The Court's certiorari jurisdiction is too precious to be exercised for the unseemly purpose of reargument about matters of settled statutory construction.

## II. TITLE VII'S PROHIBITION AGAINST SEX DISCRIMINATION APPLIES TO DEFINED CONTRIBUTION PLANS AS WELL AS DEFINED BENEFIT PLANS.

Some briefs in support of Arizona argue that because Manhart was concerned with take-home pay and because women under Arizona's plan suffer no diminution in

current take-home pay, there is no discrimination under §703(a). For women who work, however, the practical effect of being subjected to a discriminatory "defined contribution" or a discriminatory "defined benefit" plan is the same: Women are compensated less than their male counterparts.

In fact, providing a lower level of benefits to retired women is, if anything, more invidious than requiring women to contribute a slightly larger portion of their current earnings to a discriminatory plan. Retired workers, particularly women, have fewer opportunities to supplement their income than currently employed persons who often moonlight to add to their current income. Indeed, the Congress recognized that "older workers find themselves disadvantaged in their efforts to retain employment" and that "arbitrary

discrimination in employment because of age" burdens the commerce of our nation. 29 U.S.C. §621(a)(1) and (4).

Moreover, it is unrealistic for several of the amici to speak of a "present value" for retirement benefits, for the true value of those benefits is measured by their purchasing power when received. It is, therefore, the level of benefits received, and not the actuarial quality of lifetime benefits, that is important to persons who need a retirement income. Retired persons have current expenses, not lifetime expenses, and it simply ignores the economic realities to suggest that retired women who must suffer a lower level of benefits are not being discriminated against with respect to the deferred portion of their compensation.

This economic reality - that employees are concerned with their day to day needs,

and not with hypothetical present value or actuarial equality - must be underscored. Remarkably, experts from the insurance industry themselves no longer claim that retired persons can get along on substantially reduced incomes. H. Denenberg, R. Eilers, J. Melone and R. Zelten, Risk and Insurance, pp. 283-84 (3rd. ed. 1974). These experts point out what is common knowledge: That social pressures discourage retired persons from substantially changing their way of life; that our increasingly mobile society has drawn families apart so that parents do not move to their children's homes as often as in the past; and that the basic costs of existence (food, shelter, clothing and the like) are fixed at high levels regardless of whether one is employed or not. Ibid. Congress specifically recognized these problems when it enacted ERISA to protect the "well being and secu-

rity of millions of employees and their dependents [who] are directly affected by these [employee benefit] plans." 29 U.S.C. §1001(a)-(c).

Just as Congress has recognized the economic realities of a stable and sufficient income during the retirement years, this Court, too, has recognized the importance of construing statutes by focusing on the economic realities of the subject matter to which the statute is being applied. E.g. United Housing Foundation, Inc., v. Forman, 421 U.S. 837, 848 (1975); S.E.C. v. Howey Co., 328 U.S. 293, 298 (1946). Proper regard for the economic realities of retirement benefits shows that discrimination in receipt of the benefits themselves is just as invidious as discrimination in contributions to the benefit plan.

In fact, as the foregoing discussion painfully reflects, providing a lower level

of benefits to retired women virtually condemns retired female workers whose retirement funds do not meet their needs to a poorer and meaner existence. This is the economic reality which Congress dealt with when it prohibited discrimination against individuals, not classes.[3] As this Court

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[3] The relationship between actuarial significance and economic reality was noted by that keen observer of the human condition, Charles Dickens:

"Now, this schoolroom is a Nation. And in this Nation, there are fifty millions of money. Isn't this a prosperous nation? Girl number 20 isn't this a prosperous nation and a'n't you in a thriving state?. . . .

"Miss Louisa, I said I didn't know. I thought I couldn't know whether it was a prosperous nation or not, and whether I was in a thriving state or not, unless I knew who had got the money, and whether any of it was mine. But that had nothing to do with it. It was not in the figures at all, said Sissy, wiping her eyes." C. Dickens, Hard Times for These Times, p. 52-53 (1854)(Holt, Rinehart and Winston, 1958 ed.).

pointed out in Manhart, Congress intended Title VII to eliminate the problem of unequal compensation (whether in defined benefit plans or defined contribution plans) insofar as the discrimination is based on generalizations about female longevity. 435 U. S. at 710-11.

In terms of economic realities, therefore, no meaningful distinction can be drawn between defined benefit and defined compensation plans for purposes of coverage by §703(a). The rationale for substantive coverage of retirement benefits in Manhart, therefore, amply covers this case, and the fact that Arizona offers a defined contribution plan presents no ground for reversal.

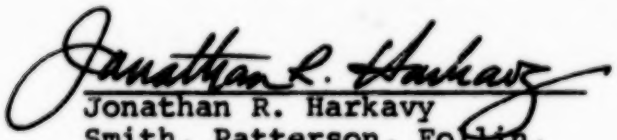
## CONCLUSION

The judgment of the Court of Appeals should be affirmed on the basis of

Manhart's construction of §703(a) of Title VII.

This 5th day of January, 1983.

Respectfully submitted,



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